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MISTAKE IN THE FORMATION AND PERFORMANCE OF A CONTRACT.

III. MISTAKE IN REDUCING TO WRITING.

When a verbal contract has been completed and is reduced to writing, there is an opportunity for a mistake to occur in the writing.

The common law rule of evidence, that a writing could not be varied by parol testimony, has given considerable difficulty,[1] and the objection that the relief violates the rule has been raised in many cases. It is now, however, well settled that where there is clear proof of a previous oral contract, to which the written contract can be made to conform, the party prejudiced by the mistake in the writing may have appropriate relief.[2]

The parol evidence rule originally necessitated an interference by a court of equity, but[3] in most jurisdictions the relief is now administered in a common law proceeding or in an action under a code.

[1]See 1 Story, Eq. Juris. (13 ed. 1886) Sec. 154, p. 168.

[2]Accordingly, in the following cases, the rule was applied, and the written contract was reformed. Wilson *v.* Wilson (1854) 5 H. L. C. 40. Where the case arose on a defence made by the party who made the mistake in a suit on the contract, defence allowed. Pitcher *v.* Hennessey (1872) 48 N. Y. 415, Keener, Vol. 3, p. 65; Park Bros. & Co. *v.* Blodgett & Clapp Co. (1894) 64 Conn. 28, Keener, Vol. 3, p. 150; Laver *v.* Dennett (1883) 109 U. S. 90; Inskoe *v.* Proctor (Ky. 1827) 6 T. B. Mon. 311; Lee, Holland & Co. *v.* Taylor (1893) 154 Pa. St. 95; Smith *v.* Jordan (1868) 13 Minn. 264; McCurdy *v.* Breathitt (Ky. 1827) 5 T. B. Mon. 232; Hamilton *v.* Asslin (Pa. 1826) 14 S. & R. 448; Chalfont *v.* Williams (1860) 35 Pa. St. 212; Gammage *v.* Moore (1875) 42 Tex. 170. Builder's contract. Party making mistake not very careful. West *v.* Suda (1897) 69 Conn. 60; Coles *v.* Hulme (1828) 8 B. & C. 568; Boyd *v.* Brotherson (N .Y. 1833) 10 Wend. 93; Burnham *v.* Allen (Mass. 1854) 1 Gray 496; Langdon *v.* Goode (1682) 3 Lev. 21.

[3]See Paysant *v.* Ware & Barringer (1840) 1 Ala. 160.

The party prejudiced by the mistake may proceed in a court of equity, in advance of performance, for a decree of reformation, or he may apply for an injunction restraining the other party from proceeding under or using the contract until the mistake has been corrected. In a jurisdiction where equitable principles are administered at common law, he may defend in an action on the contract on the ground of mistake, or he may sue on the contract, setting up the mistake as part of his case. Such mistakes, however, are not usually discovered in the ordinary course of business until the time for performance arrives, and the party ascertains the exact respect in which the mistake is going to affect his pocket. An application, even in equity, in advance of performance, is rare, and the contract is generally reformed and enforced as reformed in one proceeding.

It is necessary to require competent proof of the previous oral agreement,[4] because it is very easy for a man, when he is faced with liability on a contract, to think that it should be reformed in order that he may escape the obligation.[5]

The principle involved in this part of the discussion is of frequent application in the law of insurance. An insurance policy is not a contract itself, but is a writing reciting the performance by the insured of his part, to-wit, the payment of the premium, and setting forth the obligation of the company. The issuing of the policy is usually preceded by a previous agreement between the parties, which agreement is the real contract in the case.[6] The

[4]In the case, therefore, of an alleged mistake in reducing the contract to writing, when the parties disagree as to what the contract really was, and there is no other evidence, the court cannot decree a reformation because there is no clear proof of a contract to which the written agreement can be made to conform.

[5]In these cases, there was insufficient evidence of mistake in reducing to writing. Linn *v.* Barkey (1855) 7 Ind. 69; Fulton *v.* Colwell (1902) 112 Fed. 831; Campbell *v.* Hatchett (1876) 55 Ala. 548; Hamlon *v.* Sullivant (1882) 11 Ill. App. 423; Miner *v.* Hess (1868) 47 Ill. 170; Fehlberg *v.* Cosine (1888) 16 R. I. 162, Keener, Vol. 3, p. 312; Caldwell *v.* Depew (1889) 40 Minn. 528, Keener, Vol. 2, p. 1000; Tufts & Colly *v.* Larned (1869) 27 Ia. 330; Dulaney *v.* Rogers (1878) 50 Md. 524; Thompsonville Mfg. Co. *v.* Osgood (1857) 26 Conn. 16.

[6]See language of Harlan, J., in Snell *v.* Ins. Co. (1878) 98 U. S. 85, Keener, Vol. 3, p. 80, although the circumstances of the case may be different; see Mackenzie *v.* Coulson (1869) 8 Eq. Cases 368, Keener, Vol. 3, p. 267. In this case the insured applied for insurance and paid the premium upon receiving the policy. The company alleged a mistake and filed a bill, an action at law being pending upon the policy, to have it rectified, alleging that it was not in accordance with the previous agreement. The court said: "It is impossible for this court to rescind or alter a contract with reference to the terms of the negotiation which preceded it. It is clear that in this case the policy was the offer, and payment of the

performance by the company is the payment of the loss. The policy, therefore, is a reduction of part of the contract to writing. Where, through mistake, the policy does not conform to the previous agreement, there is a mistake in reducing the contract to writing.[7]

It is often difficult to distinguish between a mistake in formation and a mistake in reducing the contract to writing, and the distinction is frequently overlooked, although it is of great importance in order to demonstrate the fallacy of the notion that there must be a mutual mistake in reducing the contract to writing before the law can afford relief. The contract is generally reduced to writing by one party or the other, or by a third party acting for one or the other or both, and it is clear that no mistake in such writing can operate to the prejudice of either party who does not know of the mistake. No mistake of one party in reducing the contract to writing can deprive the other of his rights under the contract already formed, and, on the other hand, the circumstance that a party has made a mistake in reducing the contract to writing cannot deprive him of the right to have the mistake corrected. It is not necessary, therefore, although there are some expressions in the books to that effect, for the mistake to be mutual. It is plain, from an examination of the cases, that the law gives relief whether the mistake is or is not mutual, and no case has been found of a mistake in reducing to writing in which the necessity for mutuality of mistake has been insisted on.

A court of equity will sometimes presume a mistake in reducing a contract to writing. There is a presumption of law that all written instruments conform to the intention of the parties. This

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premium the acceptance, and then only was there a complete contract." The cases of suits against insurance companies are further complicated by the circumstance that the policies are generally issued by agents acting on behalf of the company, and the question as to how far the company is bound by the representations of the agent frequently arises.

[7] In the following cases the policy was not written to conform to the application, and the insured was afforded relief. Error as to the interest insured. Longhurst *v.* Ins. Co. (1865) 19 Ia. 364; Ins. Co. *v.* Gillett (1880) 54 Md. 212; Snell *v.* Ins. Co. (1878) 98 U. S. 85, Keener, Vol. 3, p. 80; Woodbury Savings Bank *v.* Ins. Co. (1863) 31 Conn. 517. Error in name of insured. Bill to reform and recover on the policy. Keith *v.* Ins. Co. (1869) 52 Ill. 518. Error in date of expiration. Ins. Co. *v.* Jaynes (1877) 87 Ill. 199. Error in street number of property. Ins. Co. *v.* Myer (1879) 93 Ill. 271. Error in inserting a co-insurance clause. Palmer *v.* Hartford Fire Ins. Co. (1887) 54 Conn. 488, Keener, Vol. 3, p. 317. In these cases, the evidence of the mistake was insufficient. Tesson *v.* Ins. Co. (1867) 40 Mo. 33; Edmonds's App. (1868) 59 Pa. St. 220.

is a natural presumption, because, otherwise, why would the parties have signed the instrument? Now, where there is a joint bond, and the money for which the bond was given was borrowed by or came to the use of both parties, the contract antecedent to the bond is that each and both should be bound to pay. When, therefore, the bond is afterwards drawn as a joint bond only, there may be a reasonable presumption that by reason of mistake, the intention of the parties has not been carried into effect.[8]

It frequently happens that a question arises as to mistake in reducing to writing an oral agreement for the conveyance of land. In such case, of course, the provisions of the Statute of Frauds are to be considered, and the question whether a mistake can be corrected depends on the construction of that statute, and not on principles relating to the law of mistake. Further reference to this subject is therefore omitted.

Where consent is given to the omission of a stipulation from a written agreement upon the promise that the omission will make no difference, it is not a case of mistake.[9] Under the same principle come the cases where a party signs a document under a representation as to its legal effect,[10] or under the impression that words substantially to a certain effect were incorporated.[11]

So, where a stipulation is omitted voluntarily by both parties upon a certain assumption as to its legal effect, there is no case of mistake in reducing the contract to writing. The writing stands just as they agreed it should.

Where the parties conduct oral or other negotiations which do not proceed to a perfect contract, and then one of the parties offers to the other a writing embodying the contract, and the other signs, he is bound because the written instrument is in the nature of an offer which he is obliged to examine before he signs. He is

[8]Language of Tilghman, C. J., in Weaver *v.* Shryock (Pa. 1820) 6 S. & R. 261 at 264. For a case of the reformation of such a bond as against the surety, see Moser *v.* Libenguth (Pa. 1830) 2 Rawle 428.

[9]Braun *v.* Wis. Rendering Co. (1896) 92 Wis. 245. So where the clause is left out and trust placed in the other party with respect thereto, there is no mistake and no relief. Betts *v.* Gunn (1857) 31 Ala. 219. Thus, where a clause as to interest was omitted because supposed to be usurious, but with a gentleman's agreement that it should be enforced, it was held that it could not be inserted in the contract when one of the gentlemen went back on his promise. The court put the case on the ground of mistake of law. Greene *v.* Smith (1899) 160 N. Y. 533.

[10]Fehlberg *v.* Cosine (1888) 16 R. I. 162, Keener, Vol. 3, p. 312; Fry *v.* National Glass Co. (1904) 207 Pa. St. 505; Williams *v.* Hamilton (1898) 104 Ia. 423.

[11]Cochran *v.* Pew (1893) 159 Pa. St. 184.

bound by his acceptance of the offer, and his mistake, if any, is unilateral and exists in his own mind only.[12] The party must read and understand the document before signing.[13] But where he could not read, and the contract was read over to him, and he called attention to the supposed omission, and was assured by the other party that the agreement covered everything agreed upon, he could have relief.[14] In this case he depended on the other party to write the contract, and the case is almost one of fraud.[15]

IV. Mistake in Performance.

There are several cases of mistake in performance which may arise:[16] (1) Performance of a contract to which the party performing has a good defence other than that arising out of mutual mistake in formation. (2) Performance of a contract when the other party has, by mistake, made an insufficient performance of his part of the contract. (3) Mistake in performance to the prejudice of the other party. (4) Mistake in performance to the prejudice of the party performing. The cases will be discussed under these divisions, before proceeding to which, however, we shall notice several matters which have obscured the subject.

Where the mistake is in the performance of the contract, it is not necessary for it to be mutual,[17] although in many cases of

[12]Marshall *v.* Westrope (1896) 98 Ia. 353, Keener, Vol. 3, p. 166.

[13]Muller *v.* Kelly (1902) 116 Fed. 545.

[14]Williams *v.* Hamilton (1898) 104 Ia. 423.

[15]The attempt is frequently made to lay down a general rule as to the effect of negligence in signing a paper. It is clear, however, upon reflection that the rule will differ according to the circumstances of the case. Thus, if the negligence is in signing, by way of acceptance, a paper which is an offer, the party signing has small chance of relief; but if the negligence is in signing a paper which is a reduction of a contract to writing or the performance of a contract, the party signing can generally have relief, notwithstanding his negligence.

[16]The cases of the performance of a contract formed under such circumstances of mutual mistake that the law will relieve the parties, have already been discussed under the heading of Mutual Mistake in Formation, because the question whether the party who has performed can have any relief depends on the mistake in formation, and differs from other cases of relief because of mistake in formation only in that the parties, one or both, have proceeded further in the carrying out of the contract.

[17]Keener, Quasi Contracts (1893) 122; Bishop, Contracts (2 ed. 1907) Sec. 703. The contention that the mistake must be mutual was urged, without success, in the following cases: Garrard *v.* Frankel (1862) 30 Beav. 445, Keener, Vol. 3, p. 261; Keister *v.* Myers (1888) 115 Ind. 312, Keener, Vol. 3, p. 314.

mistake in performance, the courts have used expressions to that effect.[18]

The party seeking relief from a mistake in performance by the other party cannot be deprived of his remedy because he did not know of or participate in the mistake, nor, on the other hand, can the party who has made the mistake in performance to his own prejudice, be deprived of his remedy. Furthermore, when the argument that the mistake must be mutual is attentively considered, it will be found to have an effect just opposite to that generally supposed. The greater the mutuality of the mistake in performance, the more room there is to argue that the parties have waived the correct performance prescribed by the terms of the contract and substituted the incorrect performance. When the mutuality is less, the party seeking relief has stronger ground to insist upon the compliance with the terms of the contract.

Although the notion that the mistake must be mutual is frequently found in the books, it clearly proceeds from a failure to distinguish between mistake in formation of the contract and mistake in performance, which distinction is of great importance but is generally overlooked. The common confusion on the subject is well illustrated by the remarks of a learned writer in the Harvard Law Review,[19] who calls attention to two cases which he says are inconsistent, one, the case of *Wood* v. *Boynton*,[20] where the parties bought and sold for one dollar a certain stone in the mutual and erroneous belief that it was a topaz. In truth it was a diamond worth $700, and it was held that there was a mutual error which would not justify relief by the court. The other is the case of *Chapman* v. *Cole*,[21] where the plaintiff passed a gold coin, privately issued in California by one Moffat, all parties mistaking it for a fifty cent piece. The fifty cent piece was apparently due under some contract, and the plaintiff was allowed to recover the value of the Moffat coin from a third person to whom it had been passed under the same mistake. The distinction between the cases is clear. The first was that of the sale of a specific chattel, with a mutual mistake as to value in the formation, for which the law

[18] *E. g.*, Metropolitan Counties Society *v.* Brown (1859) 26 Beav. 454; Baldwin *v.* Nat. Hedge & Wire-Fence Co. (1896) 73 Fed. 574; Schoonover *v.* Dougherty (1879) 65 Ind. 463. Court relied on the supposed circumstance that the mistake was mutual. Cleghorn *v.* Zumwalt (1890) 83 Cal. 155.

[19] Edwin H. Abbot, Jr., 23 Harv. L. Rev. 608, at 616 (1910).

[20] (1885) 64 Wis. 265.

[21] (Mass. 1858) 12 Gray 141.

affords no relief. The second was the case of a mistake in performance, one party giving by mistake something in performance more valuable than he was obliged to, and it was properly held that he could recover the amount of that performance.

The distinction between mistake in reducing the contract to writing and mistake in performance, although clear on principle, is sometimes difficult to draw on the facts. Thus, in the case of *Garrard* v. *Frankel*,[22] there was an agreement to lease a house at a certain rental. It might be said that the lease in which there was a mistake, executed and delivered by the lessor, was the performance of the previous agreement to lease, and yet, on the other hand, that the lease was a contract, and therefore the case was one of mistake in reducing the contract to writing.[23] The distinction is of importance in the interests of clear thinking, and has been already referred to.

We now come to the discussion of mistake in performance, and we shall first take up the case, previously referred to, where the party performs the contract in ignorance of the fact that he has a good defence for refusing to perform.[24] In like manner, and for the same reason, the party accepting performance under the contract in ignorance of the fact that he is entitled to other or more valuable performance, is entitled to a similar relief. The remedy here was originally equitable, the party who had performed being helpless at common law. As most of these cases were those where the performance was the payment of money, the action for money paid under a mistake was adapted to the case, and the equitable principle was thus introduced into the common law. Many of the cases illustrating these principles are those where an insurance company pays the amount due under the policy, not knowing at the time of payment that there is a good defence to the claim.[25]

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[22](1882) 30 Beav. 445, Keener, Vol. 3, p. 261.

[23]For an instance of preliminary negotiation preceding a lease, see Paget *v.* Marshall (1884) L. R. 28 Ch. D. 255, Keener, Vol. 3, p. 295. That a lease is the performance of the contract, see Gregory *v.* Wilson (1851) 9 Hare 683.

[24]The defence may arise from a relievable mutual mistake in the formation of the contract, and such cases have already been discussed under the heading of Mutual Mistake in Formation.

[25]Accordingly, in these cases the company recovered the amount so paid. Merchants Ins. Co. *v.* Abbott (1881) 131 Mass. 397. Defence of breach of warranty. DeHahn *v.* Hartley (1786) 1 D. & E. 343. Defence of fraudulent representation. Life Ins. Co. *v.* Minch (1873) 53 N. Y. 144. Violation of clause forbidding other insurance. Ins. Co. *v.* Walsh (1853) 18 Mo. 229. Company recovered in action of deceit. Ins. Co. *v.* Matthews

Where a fire insurance policy contained a clause avoiding the policy if the insured should make a conveyance of the property, and the insured made such a conveyance, and the company, in ignorance thereof, collected assessments on the policy, it was held that the company could contest the policy and the insured could recover back the premiums paid.[26] So, also, where there is a payment of a lapsed policy, the case is that of a payment under a supposed contract which has ceased to exist, and as to which there is no liability, and with respect to which the company may recover back the payment.

This principle is also of frequent application in the case of life insurance, where the beneficiary and the company deal with the policy under a mistake as to the existence or non-existence of the insured, and the fact turns out to be otherwise than they supposed. In this case, the party prejudiced is entitled to deal with the policy in accordance with the fact as it really was.[27]

In these cases, the payment by the company of the loss is the performance of the contract, and the acceptance by the beneficiary of the amount so paid is the acceptance by him of the performance, and the performance by one or acceptance by the other, in the shape of a cancellation of the policy, renewal or issuing of new insurance in place of old, is a mistake in performance, although these cases are not generally so considered by the courts and text writers. Where, however, there is a mutual doubt as to whether the insured is alive, and the agreement as to the policy is plainly in relief of that doubt, the agreement is binding.[28] So, also, where the insured receives payment under the

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(1869) 102 Mass. 221; Ins. Co. *v.* Sturgis (Mass. 1859) 13 Gray 177. Defence of subrogation. Castellain *v.* Preston (1883) L. R. 11 Q. B. Div. 380. If the insurance company is under an absolute liability to pay a certain sum for total loss, and in ignorance of the liability cancels the policy for the balance of the term and returns the unearned premium, it is not absolved from the liability. Duncan *v.* Ins. Co. (1893) 138 N. Y. 88.

[26]Hazard *v.* Mutual Fire Ins. Co. (1863) 7 R. I. 429.

[27]Surrender of old policy and taking out of paid up policy. Riegel *v.* American Life Ins. Co. (1893) 153 Pa. St. 134, Keener, Vol. 3, p. 191. Receipt of overdue premiums after death of insured. Pritchard *v.* Asso. (1858) 3 C. B. [N. S.] 622. See, also, Kelly *v.* Solari (1841) 9 M. & W. 54. Thus, where the insurance company pays the amount of the policy to a holder, each thinking the insured dead, and it turns out that he really was alive, the company is entitled to recover back the amount paid and the policy is to be reinstated. Ins. Co. *v.* Stewart (Scotland 1871) 9 Ct. of Sess. Cas., 3 series, 534.

[28]Sears *v.* Grand Lodge (1900) 163 N. Y. 374.

policy by mistake, being entitled to a larger amount, he is entitled to recover.[29] When, however, the money is really due in conscience and equity under the contract, there can be no recovery of the amount paid, even though there was a technical defence in ignorance of which the payment was made, and under which the party paying might have successfully resisted an action against him upon the contract.[30] A few other cases of mistake in payment, where there was a defence, are collected in the note.[31]

But where the party making the payment knows at the time that he has a good defence, he does not make a mistake. He has knowledge of the facts, and voluntarily pays the money, and, as may be expected, the law is that he cannot have any relief, and he cannot recover the amount paid.[32] Where, however, the party settles by way of compromise, there can be no recovery on the ground of unknown defence.[33] And it has been decided in some cases that if the party performing might have learned of the defence, he cannot recover.[34]

The second, third and fourth cases of mistake in performance can be more conveniently discussed together[35] with reference to

[29]Lord *v.* Accident Asso. (1894) 89 Wis. 19.

[30]Franklin Bank *v.* Raymond (N. Y. 1829) 3 Wend. 69; Platt *v.* Bromage (1855) 24 L. J. Ex. 63. Overpayment on a particular account, money due on whole account. Foster *v.* Kirby (1862) 31 Mo. 496. Loan repaid, bond given for it not enforceable, of which party paying was ignorant. Munt *v.* Stokes (1792) 4 T. R. 561.

[31]Party paying note thinking it is his, when threatened with suit, and in fact not his note, can recover amount paid. Lewellen *v.* Garrett (1877) 58 Ind. 442. Goods deposited on storage to be returned or a fixed value paid. In demand for a return, the goods not being found, the warehousemen paid the amount due thinking the goods stolen. They were afterwards found and it was held that the warehousemen could recover or stop payment of the check, even though they were negligent. State Sav. Bank *v.* Buhl (1901) 129 Mich. 193; Guild *v.* Baldridge (Tenn. 1852) 2 Swan 295.

[32]Put on the ground of lack of diligence in inquiring as to the defence. Nat. Life Ins. Co. *v.* Jones (N. Y. 1873) T. & C. 466. Payment of note, with knowledge of defence on the ground of fraud. Baldwin *v.* Foss (1887) 71 Ia. 389; Morrison *v.* Ins. Co. (1872) L. R. 8 Exch. 40.

[33]Stache *v.* Ins. Co. (1880) 49 Wis. 89.

[34]In the case of Ins. Co. *v.* Wager (N. Y. 1858) 27 Barb. 354, the court said that if the ignorance was as to a matter affecting the formation of the contract, the company must be held to a duty to inquire, but if it was ignorance as to a matter affecting the performance of the contract, the rule was different.

[35]They have already been referred to, and are as follows: (2) Performance of a contract when the other party has, by mistake, made an insufficient performance of his part of the contract. (3) Mistake in performance to the prejudice of the other party. (4) Mistake in performance to the prejudice of the party performing.

the various classes of cases in which they may occur. The principal distinction to be observed is that between the case where the party performing makes a mistake which is to his prejudice, and the case where he makes a mistake in performance to the prejudice of the other party. The party performing may do more than he promised to do, so that he himself has suffered loss, and the other party has reaped an undue advantage not contemplated. In such case, the party performing may proceed in a court of equity for a decree restoring him to the position he would have been in, if he had really and properly performed the contract; or, where the performance is the payment of money, he may bring an action for money paid under mistake.

On the other hand, the party performing may do less than he has promised to do, so that the other party has suffered a disadvantage for which he had not bargained, and which was not contemplated in the contract. In this case, the party who has suffered may, according to the circumstances of the case, sue on the contract at common law, proceed in equity for relief by way of decree for specific performance, or, if he himself has not yet performed, he may refuse to perform, and defend in a common law action for damages in a case where equitable defences are allowed, or if he cannot do this, he may ask for an injunction in a court of equity to restrain the other party from suing him at law. It will therefore be observed that where the mistake in performance is to the prejudice of the party to whom the performance is due, the remedy of the latter, except when he proceeds by way of specific performance, is generally on the contract,[36] where the common law affords ample remedies in the case where the performance is not in agreement with the terms of the contract, the defence that the one performing made a mistake being no answer to the right of the other party to a correct performance.

Where, however, a party has performed by mistake to his own prejudice, his remedy was originally equitable, the common law affording no relief until the introduction of the action for money had and received. These principles have been applied to a number of different instances of mistake in performance which will now be referred to.

Thus, where the party owing money under a contract, by mis-

[36]See Miner *v.* Bradley (Mass. 1839) 22 Pick. 457.

take passes counterfeit money in payment, the other party is not prejudiced by the attempted performance, and may still recover the amount due under the contract.[37]

Sometimes a chose in action is transferred in payment of the amount due under a contract, and here we must make a distinction. If the chose in action is a specialty, it is a rule of the common law, founded on the supposed importance and solemnity of the instrument, that the sum due is thereby discharged, being merged in an obligation of a higher nature, unless the parties expressly agree otherwise. In such a case, therefore, if there is no express agreement, the parties take the risk of a mistake in the instrument, and if there is any such mistake, there can be no relief. But where an instrument of a less solemn nature is given and transferred, as a note, check, or bill of exchange, the rule is otherwise, and the sum due under the contract is not discharged unless the parties so expressly agree, and in such case, if there is any mistake in the instrument to the prejudice of either party, the law will give relief.[38]

In all cases where there is money due under a contract or on

[37]Thomas *v.* Todd (N. Y. 1844) 6 Hill 340; Markle *v.* Hatfield (N. Y. 1807) 2 Johns. 455; Young *v.* Adams (1810) 6 Mass. 182; Ramsdale *v.* Horton (1846) 3 Pa. St. 330; Lane *v.* Hogan (Tenn. 1833) 5 Yerg. 290; Bank *v.* Buchanan (1888) 87 Tenn. 32; Kent *v.* Bornstein (Mass. 1866) 12 Allen 342.

[38]The following are cases of mistake in performance by way of error in negotiable paper. Officers of a corporation signed note given in payment of amount due from the corporation under a building contract in a manner that made them individually liable; the mistake was set up in a suit against them on the note, and the liability restricted accordingly. Lee and Jamieson *v.* Percival (1892) 85 Ia. 639; Keener, Vol. 3, p. 135. Note given by maker in settlement of amount due under contract by mistake drawn for more than the amount due; the maker was entitled to a defence in an action on the note. Southall *v.* Rigg (1851) 11 C. B. 481. For a similar case, where the maker obtained no relief, the note having been paid and mistake not discovered until after one year and two months afterwards, see Brummit *v.* McGuire (1890) 107 N. C. 351. Note given in payment drawn without interest. Botsford *v.* McLean (N. Y. 1866) 45 Barb. 478. Note given, interest omitted; maker paid the interest but could not recover. Buel *v.* Boughton (N. Y. 1846) 2 Den. 91. Where, however, no rate of interest is fixed in the instrument, and the party voluntarily pays more, he fixes the amount of the performance himself and cannot recover an excess, which, under the law, he need not have paid. Carson *v.* Cochran (Minn. 1892) 53 N. W. 1130. Holder transferred note in part payment for goods sold; seller ignorant of insolvency of the maker; holder knew of insolvency. Held, that seller had an action for deceit; he could have sued on the contract, there being a mistake in performance. Gordan *v.* Irvine (1898) 105 Ga. 144. Mistake in failing to endorse note. Hughes *v.* Nelson (1878) 29 N. J. Eq. 547. Mistake as to form of endorsement. Stafford *v.* Fetters (1881) 55 Ia. 484; Keener, Vol. 3, p. 86.

an account of a series of dealings between the parties, and there is a mistake in the amount of the payment, the party who has lost by the mistake can be relieved; if he has overpaid, which is the usual case, by action for money paid under mistake; if he has not received enough, he has an obvious remedy on the contract.[39]

It has been said in these cases that the law implies an agreement to repay an overpayment. This is a fiction used merely to introduce the equitable remedy into the common law. There is no such promise and no necessity at the present time of implying one. Common justice requires the correction of the mistake.[40]

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[39]Relief was accordingly afforded in the following cases. Error in account stated. Teller *v.* Sommer (1890) 132 Pa. St. 33; Jones *v.* Dunn (Pa. 1842) 3 W. & S. 109; Stuart *v.* Sears (1875) 119 Mass. 143; Worley *v.* Moore (1884) 97 Ind. 15. Error in account between mortgagor and mortgagee. Daniel *v.* Sinclair (1881) L. R. 6 App. Cases 181. Where a debtor on a note secured by real estate pays more interest than the note calls for, he can recover the excess, whether the mistake be mutual or not. Stotsenburg *v.* Fordice (1895) 142 Ind. 490. Mortgagee who by mistake credited mortgagor with a year's interest which had not been paid, entitled to recover it in an action for the amount. Tinslar *v.* May (N. Y. 1832) 8 Wend. 561. Mistake in payment of excess interest. Mayor *v.* Tardos (1883) 14 La. Ann. 10. Mistake in dividing the purchase money of land. Haven *v.* Foster (Mass. 1829) 9 Pick. 112. A creditor, with others, signed an agreement giving debtor time and option to settle for 50%; debtor, by mistake, supposing he owed the creditor more, intending, as the creditor understood, to pay 50% of the debt, paid the whole, and the creditor, who knew of the mistake, did not mention it. Held, the debtor could recover back half the amount paid. Trecy *v.* Jefts (1889) 149 Mass. 211. Mistake in overpayment under a contract. Belden *v.* State (1886) 103 N. Y. 1. Where the plaintiff had paid for two parcels of *terra japonica*, one of 25 tons, the other of 150 tons, and the parcels turned out to be only 24 tons and 132¾ tons respectively, he was entitled to recover the overpayment. Devaux *v.* Connolly (1849) 8 C. B. 640. Mistake in overpayment on a building contract, recovered. Brown *v.* Gravel Road Co. (1877) 56 Ind. 110; R. R. Co. *v.* Faunce (Md. 1847) 6 Gill 68; Sharkey *v.* Mansfield (1882) 90 N. Y. 227. Overpayment on contract for cutting and hauling logs; mistake of payor, payee innocent; demand must be brought before bringing suit. Gillett *v.* Brewster (1890) 63 Vt. 312. Overpayment by purchaser in a continuing contract for the sale of milk in periodical deliveries. Davis *v.* Kling (N. Y. 1894) 77 Hun 598. But where the lessee paid the lessor habitually more money each month than was due, the rent being reserved in sterling money and estimated and paid in currency, part of the claim was barred by the Statute of Limitations, and as to the balance, there was on the whole account some rent still due, estimating the payments which had been made correctly, and the lessee was entitled to no relief, although there was a *dictum*, which is contrary to the weight of authority, that he could not recover the excess. Clarke *v.* Dutcher (N. Y. 1824) 9 Cowen 674. Double payment for goods; party paying entitled to recover. Beadenbaugh *v.* Cooper (S. C. 1860) 13 Rich. L. 42. For other cases of overpayment, see Farrell *v.* Burbank (Minn. 1894) 59 N. W. 485; McGinnis *v.* The Mayor (N. Y. 1876) 6 Daly 416; Noyes, French and Fickett *v.* Parker (1892) 64 Vt. 379; Frambers *v.* Risk (1872) 2 Ill. App. 499.

[40]As to jurisdiction of equity over accounts, see Dickinson *v.* Lewis, Garthwaite & Co. (1859) 34 Ala. 638.

In like manner, where there is a mistake in delivering the wrong goods, or in delivering more goods than were purchased, the seller can recover the price of the extra amount of goods if the purchaser declines to return them.[41]

So, also, where the subject matter of the contract, as in the case of a sale of commodities in bulk, is to be subsequently ascertained, and the parties make a mutual mistake in thinking that a certain lot of the commodities represents the quantity specified in the contract, so that one party pays for more goods than he receives, or the other delivers more goods than he receives payment for, there is a plain case of a mistake in performance, and either party may have relief.[42] But where there is a continuing contract of periodical delivery, and the parties agree upon the result of an examination of some one or more of the deliveries as a sample of the rest, there can be no relief if the others turn out to be otherwise, because the parties have provided for the doubtful fact and taken the risk.[43]

Sometimes when a contract has been partly performed, there is an agreement to vary the balance of the performance yet due. If in such case the party to whom the performance is due makes a mistake, he can have relief.[44] So, also, where one party performs in ignorance of the circumstance that the other party has not performed, he may recover the amount paid.[45]

Where there is a partnership, and the parties agree to dissolve upon certain terms, there is a contract to dissolve, and if there is any error in the performance of the contract, relief may be had

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[41]Mistake of seller in setting aside barrels of No. 3 mackerel in place of No. 1, which he had agreed to sell. The case arose on an attempt by creditors of the purchaser to replevy the goods. The court said the title had not passed and they took nothing. Gardner *v.* Lane (Mass. 1865) 9 Allen 492. The learned editor of Walds' Pollock, Contracts (2 ed. 1905) 603, p. 60, treats this, and the court seemed to take the same view, as a mistake preventing formation of contract. It is apprehended, however, that there was a complete contract for 135 bbls. of No. 1 mackerel, and that notwithstanding the proceedings, the purchaser would have had a right to sue for damages for non-delivery of the 135 bbls. See also Jenkins *v.* Mapes (1895) 53 Ohio St. 110.

[42]Wheadon *v.* Olds (N. Y. 1838) 20 Wend. 174; Devine *v.* Edwards (1881) 101 Ill. 138; Calkins *v.* Griswold (N. Y. 1877) 11 Hun 208.

[43]Murphy *v.* Ice Co. (1898) 49 N. Y. Supp. 279.

[44]Scott *v.* Hall (1899) 58 N. J. Eq. 42.

[45]Bostock *v.* Jardine (1865) 1 H. & C. 700, put by the court on the ground of failure of consideration.

just as in any other case of mistake in performance.[46] A few more cases of mistake in performance are collected in the note.[47]

The same principles apply to the case of mistake in the performance of an agreement for the sale of real estate. The mistake in these cases is almost universally a mistake on the part of the vendor in making the conveyance, which mistake may be to his prejudice or the prejudice of the vendee. A few cases have been found of mistake on the part of the vendee in paying or providing for the payment of the purchase money.[48]

[46]As where one of the parties gave the other a note which, by mutual mistake, was for an erroneous sum. Gould *v.* Emerson (1894) 160 Mass. 438; Keener, Vol. 3, p. 324. So where the clerk employed by the parties to ascertain the amount due by one of the partners, made a mistake, a settlement made on that basis was corrected. Ivinson *v.* Hutton (1878) 98 U. S. 79; Keener, Vol. 3, p. 234. Purchaser of interest at a price proportionate to future profits; payment made according to supposed profits earned; discovered afterwards no such profits had been earned; recovery of the amount overpaid allowed. Townsend *v.* Crowdy (1860) 8 C. B. [N. S.] 477. So, also, where the partners agree to dissolve, payment to be made according to certain proportions, an erroneous statement was made from the books of the firm, it does not appear by whom; plaintiff overpaid to the amount of the error, and it was held he was entitled to relief. Cobb *v.* Cole (1890) 44 Minn. 278. See also Locke *v.* Locke (1896) 166 Mass. 435. It is important, however, in these partnership cases to distinguish between this case and the case of mistake in the formation of a contract to dissolve, as where one partner makes a mistake by reason of his examination of the books, in the value of the interest.

[47]Sale of bank stock; seller made out and delivered defective transfer; directed to make a proper transfer. McKay *v.* Simpson (N. C. 1849) 6 Ired. Eq. 452. Mistake in payment of specie. Merchants Bank *v.* Bank of the United States (Pa. 1833) 4 Rawle 318. County issued void bonds in payment of previous valid ones; still liable on old bonds. Jefferson Co. *v.* Hawkins (1887) 23 Fla. 223. Deed conveying right in a patent reformed on application of the vendor to conform to the agreement of sale. Baldwin *v.* Nat. Hedge Wire Fence Co. (1896) 73 Fed. 574. Bill of sale of personal property, which specified more articles than were included in the contract of sale, reformed on bill by vendor. Menomonee Locomotive Co. *v.* Langworthy (1864) 18 Wis. 444. Where erroneous statement is sent for an amount due on notes to surety and payment is made, and it appears there was more due, the payee can sue for the amount omitted. Aultman & Co. *v.* Graham (1887) 29 Ill. App. 77. Where in part performance of a contract one party, as part of the consideration, conveys certain land, and it turns out that he has no title to the land, the other party, who is prejudiced by the mistake, can tender a reconveyance and bring suit for the amount due. Moyer *v.* Shoemaker (N. Y. 1849) 5 Barb. 319.

[48]Vendor conveyed a certain tract of ground, and took in part payment a purchase money bond and mortgage which was, for a certain reason, void, and it was held that he was entitled to have the land back upon repayment to the vendee of the money paid on account of the purchase price, without interest. Heacock *v.* Fly (1850) 14 Pa. St. 540. In settlement of the purchase money for the sale of real estate, it was agreed that the vendee should grant a life annuity purchasable with the amount of the purchase money; there was a mistake in the calculation, and the vendee granted too large an annuity. On bill filed the court annulled the deed

The greater liability to mistake on the part of the vendor probably arises from the circumstance that it is his duty to execute the conveyance, which is an instrument of highly technical character requiring special skill and care in its preparation, which is generally left to a scrivener who sometimes knows less about the matter than the parties themselves. It is for this reason probably that the parties are not held to a very high degree of diligence in executing or accepting the deed.[49]

If the vendor makes a conveyance to his own prejudice, his remedy is by application to a court of equity to reform or set aside the deed and direct a reconveyance, or in an action at common law to recover excess of purchase money due.[50]

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granting the annuity and directed the payment of the original purchase money. Carpmael *v.* Powis (1846) 10 Beav. 36. Where a mortgage had been taken in part payment of amount due for sale of real estate, and there was a mistake as to the solvency of the mortgagor, both parties thinking he was solvent when as a matter of fact the mortgage was worthless, it was held that the vendor was entitled to relief, evidently a rescission of the conveyance. Knopp *v.* Fowler (N. Y. 1883) 30 Hun 512.

[49]Vendee not precluded from relief because of failure to exercise ordinary care in examining the deed. Hutchins *v.* Pettingill (1876) 58 N. H. 3, Keener, Vol. 3, p. 371; Albany Savings Inst. *v.* Burdick (1881) 87 N. Y. 40, Keener, Vol. 3, p. 378.

[50]Accordingly, in the following cases, where the mistake in the conveyance was to the prejudice of the vendor, he was entitled to relief. Reconveyance presumably of the excess decreed. Goode *v.* Riley (1891) 153 Mass. 585; Keener, Vol. 3, p. 252. Deed omitted certain reservations. Welles *v.* Yates (1871) 44 N. Y. 525; Keener, Vol. 3, p. 272. Vendee knew of the mistake before execution of deed; deed reformed. Cleghorn *v.* Zumwalt (1890) 83 Cal. 155, Keener, Vol. 3, p. 322; Canedy *v.* Marcy (Mass. 1859) 13 Gray 373, Keener, Vol. 3, p. 35. Vendor subsequently conveyed premises mistakenly included to others, and they were joined as complainants in the bill. Loss *v.* Obry (1871) 22 N. J. Eq. 52. Vendor entitled to relief; contention that the mistake must be mutual made without success. Harris *v.* Pepperell (1867) L. R. 5 Eq. 1. Vendor entitled to relief; must return the consideration before he can have the deed set aside. R. R. Co. *v.* Steinfeld (1884) 42 Ohio St. 449. Vendor claimed that a reservation in the deed was meant to have a wider operation than the vendee was willing to admit. Stockbridge Iron Co. *v.* Hudson Iron Co. (1871) 107 Mass. 290; Keener, Vol. 3, p. 54. Equity, however, will not correct a deed misdescribing a lot when the vendee has an action at law on the covenant which he failed to pursue. Daggett *et al. v.* Ayer *et al.* (1888) 65 N. H. 82; Keener, Vol. 3, p. 181. Vendee sold to a third party who had knowledge of the mistake, and he brought ejectment against the vendor for the land erroneously included but of which possession apparently had not been delivered. He was restrained by injunction and the deed reformed as against him. Bush *v.* Hicks (1875) 60 N. Y. 298. Deed conveyed surface when it should have conveyed fee reserving the coal; reformed with an express reservation of intervening rights. Baab *v.* Houser (1902) 203 Pa. St. 470. See also similar case of Cook *v.* Liston (1899) 192 Pa. St. 19. For a case of error in the estate conveyed, by reason of improper use of technical terms, where the deed was corrected, see Clayton *v.* Freet (1860) 10 Ohio St. 544; Gillespie *v.* Moon (N. Y. 1817) 2 Johns. Ch. 585. Plaintiff had conveyed to defendant a

If the conveyance is to the prejudice of the vendee, he can, if the purchase money has not been paid, defend on the agreement or the purchase money obligation he has given. Where equitable remedies are allowed at common law, he can introduce the defence in an action on the agreement; where they are not, he must apply for an injunction restraining the vendor from bringing a suit or set up the defence in answer to a bill for specific performance by the vendor. If the purchase money has all been paid, he can sue for money paid under mistake, or sometimes file a bill in equity for a rescission of the performance of the contract.[51]

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piece of land on which was a spring, from which the plaintiff's aqueduct supplied his own and other premises with water. The plaintiff had not intended to part with his right to draw water from the spring, but by mistake no reservation was made in the deed; and defendant, at the time of the purchase, did not know of the existence of the spring. The defendant was given an option either to make a conveyance to the plaintiff entitling him to use the water from the spring or to reconvey the land on repayment of the purchase money. Brown *v.* Lamphear (1862) 35 Vt. 252. Wife who by mistake signed deed conveying her separate property to secure creditors of her husband entitled to relief exonerating the separate property. Loewenberg *v.* Glover (1898) 19 Wash. 544; but see Barfield *v.* Price (1871) 40 Cal. 535, *contra*, an obscure case where the vendor conveyed more land by mistake and for apparently insufficient reason was not permitted to have relief; court seemed to think it was necessary for the wife to show why she had made the mistake. Deed reformed to properly state an incumbrance. Hartford & Salisbury Ore Co. *v.* Miller (1874) 41 Conn. 112. Vendor failed because evidence insufficient. Tucker *v.* Madden (1857) 44 Me. 206. See also Allen *v.* Yeater (1880) 17 W. Va. 128; Merritt *v.* Getz (1902) 19 Pa. Super. Ct. 505; Stines *v.* Hays (1883) 36 N. J. Eq. 364. Vendor, however, may lose his right by laches. Willis *v.* Swartz (1857) 28 Pa. St. 413; Lewis *v.* Lewis (1874) 5 Ore. 169; Burr *v.* Hutchinson (1873) 61 Me. 514.

[51]In these cases, where the vendee was prejudiced by the conveyance, he was afforded relief: Deed prepared by scrivener of vendor, conveyed a life estate instead of a fee; reformation on application of vendee; this case can be a mistake of law or fact, whichever way it is viewed. Dinwiddie *v.* Self (1893) 145 Ill. 290; Keener, Vol. 3, p. 137. Deed imposed on the vendee obligation not bargained for; deed reformed on application. Kilmer *v.* Smith (1879) 77 N. Y. 226; Keener, Vol. 3, p. 283. Deed omitted words of inheritance. Sealey *v.* Brumble *et al.* (N. C. 1862) 6 Jones Eq. 295; Keener, Vol. 3, p. 444. Part of the land bought omitted. James *v.* Cutler (1882) 54 Wis. 172. Deeds corrected, though a number of successive vendees, on bill by last vendee against original vendor. Blackburn *v.* Randolph (1878) 33 Ark. 119. Vendee entitled to recover overpayment. Goodspeed *v.* Fuller (1858) 46 Me. 141; Murdock *v.* Gilchrist (1873) 52 N. Y. 242. In these cases the vendor made a succession of mistakes in conveying to several vendees, and the mistake was rectified between them. Cole *v.* Fickett (1901) 95 Me. 265; Wild *v.* Hillas (1859) 28 L. J. [N. S.] Ch. 170; Hileman *v.* Wright (1857) 9 Ind. 126. Vendor made a subsequent conveyance of the erroneously included property, and the first vendee was turned into a trustee for the second vendee. Lamb *v.* Schiefner (N. Y. 1908) 129 App. Div. 684; see note 22 Harv. L. Rev. 449 (1909). Vendee entitled to a conveyance of the part omitted. Wiswall *v.* Hall (N. Y. 1832) 3 Paige 313. In Trexler *v.*

A mortgage is a conveyance of real estate in performance of a previous contract between the parties for a loan, and a mistake in the mortgage is a mistake in performance. Either party prejudiced can have relief upon the same principles as are applicable to the case of relief in the conveyance of land under an agreement of sale.[52] The remedy in these cases is generally reformation of the deed or mortgage, and is to be sharply dis-

Fisher (1889) 130 Pa. St. 275, the agreement was oral; the vendee went into possession and made improvements; the vendor subsequently conveyed another lot; vendee entitled to reformation. Deed conveyed to the wife of the vendee alone, when, according to the agreement, the conveyance should have been to the vendee and wife. Corrigan *v.* Tierney (1889) 100 Mo. 276. Agreement of sale called for warranty deed; deed delivered and accepted without warranty and reformed. Evants *v.* Strode (1842) 11 Ohio St. 480. So, also, where the seal was omitted from the deed, it was reformed on bill filed by vendee. Michel *v.* Tinsley (1879) 69 Mo. 442. Where vendor conveys the wrong lot, and there are encumbrances put on the lot by the parties, the vendee can have the deed reformed, but the encumbrances must be transferred to the other lot subsequently conveyed. Weston *v.* Wilson (1870) 31 N. J. Eq. 51. Error in certificate of notary corrected. Simpson *v.* Montgomery (1869) 25 Ark. 365. Vendee entitled to maintain bill to correct description in deed, having been in peaceful possession of the land for twenty years, and mistake only recently discovered. Harold Bros. *v.* Scott and Weaver (1882) 72 Ala. 373. Parties went on the land, identified lot; deed by mistake conveyed more than the lot identified and was reformed in ejectment against vendor. Fuchs *v.* Treat (1877) 41 Wis. 404. Vendees cannot have mistake in deed corrected without joining vendor or his personal representatives. Muller *v.* Rhuman (1879) 62 Ga. 332. Sometimes the agreement is too indefinite to be enforced, and no question of mistake can arise in such a case. Auer *v.* Matthews (1906) 129 Wis. 143. See also for relief for vendee. Cake *v.* Peet (1882) 49 Conn. 501; Wall *v.* Meilke (1903) 89 Minn. 232; Comstock *v.* Coon (1893) 135 Ind. 640; Farmers & Mech. Bank *v.* Detroit (1864) 12 Mich. 445; Crowe *v.* Levin (1884) 95 N. Y. 423, Keener, Vol. 3, p. 293.

[52]Accordingly, in these cases the mortgage was reformed. Citizens Nat'l Bank *v.* Judy (1896) 146 Ind. 322; Keener, Vol. 3, p. 433. Judgment on the note, and that the mortgage be reformed and foreclosed. Keister *v.* Myers (1888) 115 Ind. 312; Keener, Vol. 3, p. 314. Mortgage did not contain all the land agreed upon; after sheriff's sale the mortgage and deed to the purchaser were reformed. Marks *v.* Taylor (1900) 23 Utah 152. Mortgage executed by mistake without a seal, corrected. Gaylord *v.* Pelland (1897) 169 Mass. 276. Error reversing the names of the parties in drawing up the mortgage, corrected. Miller *v.* Davis (1873) 10 Kan. 541. Where the mortgagor signed the mortgage without reading it, and it included another note of which he was ignorant, held, mortgagor entitled to redeem without paying the other note. Nourse *v.* Jennings (1902) 180 Mass. 592. Deed intended for a mortgage reformed. Remington *v.* Higgins (1880) 54 Cal. 620; Adams *v.* Stevens (1861) 49 Me. 362. See also Love *v.* Sierra Nevada &c. Co. (1867) 32 Cal. 639; Sowler *v.* Day (1882) 58 Ia. 252; Dwight *v.* Tayler (1883) 49 Mich. 614; Rider *v.* Powell (1863) 28 N. Y. 310; Rhodes *v.* Outcalt (1871) 48 Mo. 367; Quincy *v.* Baker (1869) 37 Cal. 465. In these cases there was insufficient proof of mistake in drawing the mortgage. Lake *v.* Meacham (1861) 13 Wis. 355; McClellan *v.* Sanford (1870) 26 Wis. 595; Harter *v.* Christopher (1873) 32 Wis. 245; Dozier *v.* Mitchell (1880) 65 Ala. 511; Hinton *v.* Ins. Co. (1879) 63 Ala. 488; Alexander *v.* Caldwell (1876) 55 Ala. 517.

tinguished from the case of reformation of a contract which has been erroneously reduced to writing. The solution of the question of mistake in the performance of oral agreements for the sale of real estate is further complicated by the provisions of the Statute of Frauds, and the cases dealing with the question lie outside the limits of this article.

Where, however, the supposed mistake is in performance, as in the form of expression of the deed, and the question is discussed between the parties, and a clause omitted because they mutually agree that it is unnecessary or because one of the parties promises the other that its omission will make no difference, the question is not one of mistake; it is a question of fraud or estoppel.[53]

Where a party, under a written contract, is entitled to a certain performance, and a different performance is tendered him, which he knowingly accepts, he cannot thereafter complain of a mistake, particularly if he had objected to the performance tendered and withdrawn the objection.[54]

The principles relating to a demand before bringing suit are omitted through lack of space, as is also a discussion of the question of when the party seeking relief must offer to place the other party in his former position.[55] As to the latter, it may, however, be pointed out that where there has been a mistake in performance, the party prejudiced who has committed the mistake must put the other party absolutely in his former position, and give him all he was entitled to under the contract.[56] But where the mistake in performance is to the prejudice of the other party, no such duty exists because the other party is entitled, unless he waives it, at all times and in all events to a correct and proper performance of the contract.

It frequently happens that one of the parties to a contract requires security from the other for faithful performance on the latter's part. The common instance of this is the case of a con-

[53]Kyle *v.* Fehley (1892) 81 Wis. 67, Keener, Vol. 3, p. 131; Martin *v.* N. Y., Susq. & Western R. R. Co. (1882) 36 N. J. Eq. 109, Keener, Vol. 3, p. 89; Green *v.* Morris & Essex R. R. Co. (1858) 12 N. J. Eq. 165, Keener, Vol. 3, p. 25.

[54]Accordingly no relief in these cases. Deed not in accordance with agreement of sale. Whittemore *v.* Farrington (1879) 76 N. Y. 452; Keener, Vol. 3, p. 209.

[55]Some slight reference to this matter has been made in some of the notes.

[56]See Hendricks *v.* Goodrich (1862) 15 Wis. 750.

tract of loan. If the agreement is that one party is to give good security or security to have a certain specified effect, and the security he gives is not good or does not have the effect specified, then he has made a mistake in performance to the prejudice of the other party, and the latter can have relief. The security can be reformed to conform to the standard set by the previous contract.[57]

Where, however, the agreement calls for the giving of a certain security in performance, then no mistake, mutual or unilateral as to the effect of the security, can be any ground for relief, because the parties have agreed upon that particular security as a performance to that extent of the contract, and for a court of equity to reform it and decree the giving of any other security, would be making a new contract for the parties, which the Chancellor always carefully avoids. Even if, in this case, the giving of the security or the agreement for the giving of a security of a certain effect is regarded as a formation of the contract, the result is the same because, as we have seen, no mutual mistake in formation can have any greater effect than to relieve the party prejudiced by the mistake from the burden of the contract, and for a court of equity in a case of this kind to reform the security, would be to increase the burden of the contract, for which result no authority has been discovered.

The leading case on this point is *Hunt* v. *Rousmanier's Adm'rs.*[58] In that case B had loaned A money and taken as collateral security a power of attorney to sell A's interest in a certain

[57]The debtor made an agreement to give security by confessing judgment; it turned out that the judgments he confessed were void, and the creditor was held to have the same position as he would have had had the judgment been valid. Lanning *v.* Carpenter (1874) 48 N. Y. 408. Where the creditor of a firm took in settlement of an account due him a bond signed by one partner under seal, which, however, did not bind the other partners but which the parties supposed did bind the other partners, the creditor can have relief in equity from the mistake. McNaughton *v.* Partridge (1842) 11 Ohio St. 223. Where a creditor with land pledged as a security was about to proceed on his claim, it was agreed that the creditor should take the land; a deed was made which it turned out was void, because the wife of the debtor did not join, and it was held the creditor was entitled to relief, as the contract of settlement had not been executed according to its terms, as the conveyance did not give the creditor what was agreed to be given, to-wit, the land of the debtor. The bill prayed for an order directing the wife to sign, but the court directed that the creditor should have his security restored. Sparks *v.* Pitman (1875) 51 Miss. 511. Contract of loan; judgment note given as security omitted the words "with interest" which had been agreed upon; reformed after judgment entered. Gump's App. (1870) 65 Pa. St. 476.

[58](1823) 8 Wheat. 174; Keener, Vol. 3, p. 6; s. c. (1828) 1 Pet. 1.

vessel. Both parties thought, and were so advised, that the power of attorney would give B as perfect security as would be given by deed or mortgage. It is clear, therefore, that this is an ordinary case of an application by A for the loan of money and promise by B to loan the money upon sufficient or certain security, and an offer by A of security which is agreed upon and received by B. The loan not having been paid, and A having died, B took possession of the vessel and ordered the interest of A sold. A's administrators forbade the sale, and B filed a bill to compel them to join in the sale. The defendants demurred. The court held that the power of attorney expired with the death of A, and then said that they were unwilling, where the effect of the instrument was acknowledged to have been entirely misunderstood by both parties, to say that a court of equity was incapable of affording relief, and reversed the decree of the court below sustaining the demurrer, and sent the case back for further proceeding. Upon the second appeal, the court refused to give B any relief, proceeding upon the ground that a power of attorney was given by A in performance of the contract, with the consent and approbation of both parties, and that being the contract of the parties, a court of equity could not make another by decreeing a different performance; that the mistake was a mistake of counsel as to the law, participated in by both parties, and therefore not such a mistake as a court of equity would relieve against.

It was unnecessary for the court to refer to the circumstance that it was a mistake of law, because, as clearly appears upon an analysis of the facts of the case, the identical document in question was given by the borrower and accepted by the lender in full performance of the contract; and, of course, the legal effect of the document having been discussed at the time, and the money loaned, and the document accepted by the lender, it is clear that the court could not reform the document because there was no contract by which the reformation could be measured, and consequently any reformation would be making a new contract between the parties.[59]

[59]Gibson, C. J., in Tyson *v.* Passmore (1845) 2 Pa. St. 122 at 125, says that the accident was the true ground of decision in the case. Mr. Bigelow, "Mistake of Law as a Ground of Equitable Relief," 1 Law Q. Rev. 298 (1885), see also 1 Story, Eq. Juris. (13 ed. 1886) 113 n., says that it has been supposed that this case draws a distinction between mistake in reducing the contract to writing and mistake with regard to the legal meaning or effect of a written instrument agreed upon as representing the contract of the parties; that this distinction is not sound and

Where one party in the performance of the contract makes a mistake and confers the benefit of the performance on a third party instead of on the other party to the contract, he must suffer the consequences of his mistake. The third party cannot be compelled to pay for a benefit conferred against his will or without his knowledge, and the other party to the contract obviously cannot be compelled to pay for a performance he never received.[60]

The discussion has been confined to the effect of mistake as between the parties to the contract.[61] There are a number of cases dealing with the effect of mistake as to third parties, to which, however, lack of space forbids any extended reference. These cases, a few of which are collected in the note, seem to be governed more by equitable principles relating to notice than by the law of contract as modified by mistake.[62]

V. SUMMARY.

We have now finished an investigation of part of a very confused branch of the law, and a brief summary of the discussion

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the case does not support it, but that the case proceeds upon the ground that there was deliberation with knowledge and choice of a course, which, however, it afterwards turned out, was not the right course; that the case decides the very sound principle that where a particular course is taken upon deliberation in preference to another present to the minds of the parties, the action so far is final.

[60]Isle Royal Mining Co. *v.* Hertin (1877) 37 Mich. 332; Boyer *v.* Richardson (1897) 52 Neb. 156; Higgs *v.* Scott (1849) 7 C. B. 63; Braithwait *v.* Bain (1896) 66 Minn. 325.

[61]Mistake can, of course, be corrected as well against volunteers claiming under the parties as against the parties themselves. Christman *v.* Colbert (1885) 33 Minn. 509; Keener, Vol. 3, p. 428.

[62]Mistake cannot be corrected as against purchaser for value without notice. Sealey *v.* Brumble (N. C. 1862) 6 Jones Eq. 295, Keener, Vol. 3, p. 444; Harms *v.* Coryell (1899) 177 Ill. 496; Galbraith *v.* Galbraith (Pa. 1837) 6 Watts 112; DeCamp *v.* Hamma (1876) 29 Ohio St. 466; Walker *v.* Ebert (1871) 29 Wis. 194; Foster *v.* Kingsley (1877) 67 Me. 152; Henry *v.* Smith (1877) 76 N. C. 311; Harlan *v.* Central Phos. Co. (Tenn. 1901) 62 S. W. 614; Youmans *v.* Egerton (N. Y. 1878) 16 Hun 28. For cases where the mistake was in a deed, and the grantee or vendee sought to have the mistake corrected as against third parties, see Stone *v.* Hall (1850) 17 Ala. 577; Larkins *v.* Biddle (1852) 21 Ala. 252; Kelly *v.* Turner (1883) 74 Ala. 513, Keener, Vol. 3, p. 92; s. c. (1881) 70 Ala. 85; Schoonover *v.* Dougherty (1879) 65 Ind. 463, vendee against judgment creditor of the vendor. Third party cannot take advantage of the mistake until deed has been corrected. Nelson *v.* Davis (1872) 40 Ind. 366. For cases of attempt by mortgagee of real estate to have mortgage reformed: Against attaching creditor. Bullock *v.* Whipp (1885) 15 R. I. 195; Keener, Vol. 3, p. 442. Against widow of mortgagor. Chapman *v.* Fields (1881) 70 Ala. 403; Citizens Nat. Bank of Attica *v.* Judy (1896) 146 Ind. 322; Keener, Vol. 3, p. 433. A minor was entitled to relief against the mistake of his guardian. Baker *v.* Massey (1879) 50 Ia. 399. Minor not entitled to relief because of twenty four years' laches. Galbraith *v.* Galbraith (Pa. 1837) 6 Watts 112.

will no doubt assist the reader in more clearly understanding the conclusions we have reached.

Relief from mistake is exceptional, and therefore depends more on the particular principles governing the case in which the mistake occurs than it does on general principles relating to the subject as a whole. Failure to adopt this view has caused a large part of the difficulty in the subject.

The distinction between mistake of law and mistake of fact originated in the year 1802, in the notion that the maxim that everyone is presumed to know the law is of general application, and the distinction is still generally observed by the courts. Although some of the greatest lawyers have studied the matter attentively, no one of them has been able either to draw the distinction between a mistake of fact and a mistake of law, or to discover the principle upon which relief will be withheld in case of mistake of law. There are, therefore, good reasons for disregarding the distinction as a mere notion originating in a *dictum* incomprehensible to the greatest minds, having no support in reason, producing hopeless confusion, and incapable of practical application. It has therefore been assumed in the discussion that there is no reason, at least so far as the law of contract is concerned, for distinguishing between a mistake of law and a mistake of fact.

The principles involved in awarding the relief which the law affords in the case of mistake in the formation and performance of a contract appear to be as follows.[63]

When either or both of the parties make a mistake as to the

[63]NOTE ON NON-CONTRACTUAL ACTS. In the following cases the mistake was as to a non-contractual act. Mistake in paying void taxes, fines, etc. Brundage *v.* Port Chester (1886) 102 N. Y. 494; Louisville & Nashville R. R. Co. *v.* Commonwealth (1890) 89 Ky. 531; City of Louisville *v.* Henning (Ky. 1866) 1 Bush 381; Tatum *v.* Trenton (1890) 85 Ga. 468; Phelps *v.* Mayor (1889) 112 N. Y. 216; Lamborn *v.* County Commissioners (1877) 97 U. S. 181; Langevin *v.* City of St. Paul (1892) 49 Minn. 189; Kraft *v.* City of Keokuk (1862) 14 Ia. 86; Cahaba, Town Council of *v.* Burnett (1859) 34 Ala. 400; Bucknall *v.* Story (1873) 46 Cal. 589; Lester *v.* Baltimore (1868) 29 Md. 415; Camden *v.* Green (1892) 54 N. J. L. 591; Vanderbeck *v.* Rochester (1890) 122 N. Y. 285; Evans *v.* Hughes County (S. D. 1892) 52 N. W. 1062; Bailly *v.* Paullina (1886) 69 Ia. 463; City of Indianapolis *v.* McAvoy (1882) 86 Ind. 587. Mistake in making return for taxation to assessor. Dunnell Mfg. Co. *v.* Inhabitants of Pawtucket (Mass. 1856) 7 Gray 277; Charlestown *v.* County Commissioners (1872) 109 Mass. 270. Mistake of sheriff in paying execution creditors. Glenn *v.* Shannon (1879) 12 S. C. 570; Rutherford *v.* McIvor (1852) 21 Ala. 750; Norris *v.* Blethen (1841) 19 Me. 348; Standish *v.* Ross (1849) 7 Exch. 527; Kingston Bank *v.* Eltinge (1859) 40 N. Y. 391. Mistake in

terms of an offer and acceptance, no contract is formed. This is sometimes termed "mutual mistake," erroneously so because there is no necessity for the mistake to be mutual. It is more correctly designated as a misunderstanding.

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levy of execution. Young *v.* McGowen (1873) 62 Me. 56. Mistake by plaintiff in execution as to defendant's title in purchasing at sheriff's sale. First Nat'l Bank of Hastings *v.* Rogers (1875) 22 Minn. 224. Mistake in payment by plaintiff in execution to sheriff of commissions not legally due. Newell *v.* March (N. C. 1848) 8 Ired. L. 441. Payment of costs erroneously taxed by prothonotary. West *v.* Houston (Del. 1844) 1 Harr. 170. Payment of costs on void judgment afterwards received. Ford *v.* Brownell (1868) 13 Minn. 184. Mistake in payment of money by plaintiff in execution. *Ex parte* James (1874) L. R. 9 Ch. App. 609. Mistake in entry in land office. Lamb *v.* Harris (1850) 8 Ga. 546. Mistake in paying costs to attorney. Moulton *v.* Bennett (N. Y. 1836) 18 Wend. 586. Mistake by banks with reference to checks, drafts, depositors' accounts, etc. Appleton Bank *v.* McGilvray (Mass. 1855) 4 Gray 518; Peterson *v.* Union Nat. Bank (1866) 52 Pa. St. 206; Merchants Nat. Bank *v.* Nat. Eagle Bank (1869) 101 Mass. 281; Boyleston Nat. Bank *v.* Richardson (1869) 101 Mass. 287; Oddie *v.* Bank (1871) 45 N. Y. 745; Whiting *v.* Bank (1879) 77 N. Y. 363; Bank *v.* Burkhardt (1879) 100 U. S. 686; Southwick *v.* First Nat. Bank (1881) 84 N. Y. 420; Preston *v.* Canadian Bank (1883) 23 Fed. 179; Bank *v.* Bank (1885) 139 Mass. 513; Bank *v.* Swift (1889) 70 Md. 515; Meredith *v.* Haines (1884) 14 W. N. C. 364; Harvey *v.* Bank (1888) 119 Pa. St. 212; Neal *v.* Coburn (1898) 92 Me. 139; Savings Bank *v.* U. S. (1894) 64 Fed. 703; Bank *v.* Bank (1888) 128 U. S. 26; Woodland *v.* Fear (1857) 7 E. & B. 519; Bank *v.* Devenish (1890) 15 Col. 229; Mutual Savings Inst. *v.* Enslin (1870) 46 Mo. 200. Mistake in drawing, endorsing, accepting, paying bills of exchange and promissory notes: Acceptor's mistake in paying forged bill of exchange. Smith *v.* Mercer (1815) 6 Taunt. 76. Drawee's mistake in accepting and paying bill of exchange. Bank *v.* Burkham (1875) 32 Mich. 328. Drawer's mistake in drawing bill of exchange. Placer Co. Bank *v.* Freeman (1899) 126 Cal. 90. Mistake by accommodation endorser in paying note on which he is not liable. Sheridan *v.* Carpenter (1872) 61 Me. 83; Fraker *v.* Little (1880) 24 Kan. 598. Mistake in acknowledging note barred by the Statute of Limitations. Harner *v.* Price (1880) 17 W. Va. 523. Mistake in paying draft. Koontz *v.* Bank (1873) 51 Mo. 275; see also Ray *v.* Bank of Kentucky (Ky. 1843) 3 B. Mon. 510.

Mistake by fiduciaries. The case of a mistake by a fiduciary arises in several aspects: (1) mistake in non-contractual acts as to the legal title; (2) mistake in contractual acts as to the legal title; (3) mistake in either case as affecting the claim of the *cestui que trust*, and the right of the latter to hold the trustee accountable; (4) mistake of the trustee in dealing with the *cestui que trust;* (5) mistake of the *cestui que trust* in dealing with the trustee. The following are a few cases of mistakes by fiduciaries: Mistake by executor. Lichfield *v.* Baker (1849) 13 Beav. 447; Northrop's Exrs. *v.* Graves (1849) 19 Conn. 548; Brandon *v.* Brown (1883) 106 Ill. 519. Mistake by administrator. Mansfield *v.* Lynch (1890) 59 Conn. 320; Culbreath *v.* Culbreath (1849) 7 Ga. 64; Davis *v.* Bagley (1869) 40 Ga. 181. Mistake by trustee in conveying the trust property. Henderson *v.* Dickey (1864) 35 Mo. 120. Mistake of trustee in paying *cestui que trust. In re* Horne [1905] 1 Ch. 76, see 18 Harv. L. Rev. 546; Girard Trust Co. *v.* Harrington (1903) 23 Pa. Super. Ct. 615; Rogers *v.* Ingham (1876) L. R. 3 Ch. Div. 351, Keener, Vol. 3, p. 75. Mistake by *cestui que trust* in dealing with trustee. Whelen's App. (1872) 70 Pa. St. 410.

Mistake by assignees. Mistake by assignee in handling the assigned estate. Apps. of During, King & Miller (1850) 13 Pa. St. 224. Mistake

Where, however, both of the parties make the same mistake, and the offer and acceptance agree, there is a true contract formed and the only question is as to how far the law will grant relief because of the mistake. These cases are treated by many learned writers under the heading of reality of consent or mutual

in making an assignment. Wanner *v.* Landis (1890) 137 Pa. St. 61. Mistake in payment by assignee. Harris *v.* Carter (1839) 5 M. & W. 431. Mistake by assignee in paying to creditors not entitled. Gage *v.* Allen (1894) 89 Wis. 98. Mistake of creditor in proving claim. *Ex parte* Bagshaw (1879) L. R. 13 Ch. Div. 304.

Mistake in judicial bond. Hall *v.* Hall (1869) 43 Ala. 488. Mistake in judicial sale and tax deed. Keepfer *v.* Force (1882) 86 Ind. 81. Mistake in bond in bastardy proceedings. Neininger *v.* State (1893) 50 Ohio St. 394; Keener, Vol. 3, p. 358. Mistake in giving bond in judicial proceedings; signing bond in ignorance of its legal effect. Glenn *v.* Statler (1875) 42 Ia. 107. Mistake in signing official bond. County of Schuylkill *v.* Copley (1871) 67 Pa. St. 386; Green *v.* No. Buffalo Township (1867) 56 Pa. St. 110. Mistake by heir in mortgaging land to secure debt of ancestor which was in fact barred by the Statute of Limitations. Blakemore *v.* Blakemore (Ky. 1898) 44 S. W. 96. Mistake by stockholder of bank in paying assessment on more shares than he owned. Holt *v.* Thomas (1894) 105 Cal. 273; see also De La Cuesta *v.* Insurance Co. (1890) 136 Pa. St. 62, and Brown *v.* Tillinghast (1897) 84 Fed. 71. Mistake in assuming a liability. Broughton *v.* Hutt (1858) 3 DeG. & J. 501; Keener, Vol. 3, p. 32. Mistake by Telegraph Co. in sending telegram. German Fruit Co. *v.* West. Union (1902) 137 Cal. 598; Hasbrouck and McColloch *v.* Teleg. Co. (1899) 107 Ia. 160. Mistake of R. R. Co. in punching wrong date of expiration in a mileage book. Krueger *v.* R. R. Co. (1897) 68 Minn. 445; in quoting freight rates, Rowland *v.* N. Y. etc. R. R. Co. (1891) 61 Conn. 103. Mistake of counsel. Hickman *v.* Berens [1895] 2 Ch. 638; Winchester *v.* Grosvenor (1868) 48 Ill. 517. Mistake in paying share of graft to superior officer. Brisbane *v.* Dacres (1813) 5 Taunt. 144. Tenant by mistake in tendering rent incurred a forfeiture, relieved against in common law proceeding. Atkins *v.* Chilson (Mass. 1846) 11 Met. 112. Mistake in payment by paymaster of army. U. S. *v.* Phillips (1892) 21 App. D. C. 309; Skyring *v.* Greenwood (1825) 4 B. & C. 281. Mistake of magistrate in record. Brewer *v.* Jones (1871) 44 Ga. 71. Mistake as to record. Conner *v.* Welch (1881) 51 Wis. 431; Keener, Vol. 3, p. 372. Mistake in release. Dambmann *v.* Schulting (1878) 75 N. Y. 55; Keener, Vol. 3, p. 202. Mistake of surety. Griswold *v.* Hazard (1891) 141 U. S. 260; Keener, Vol. 3, p. 107. See Board *v.* Otis (1875) 62 N. Y. 88; Wason *v.* Wareing (1852) 15 Beav. 151. Mistake of surety in payment to creditor. Pass *v.* Granada County (1893) 71 Miss. 426. Mistake in signing a note as surety. Miller *v.* Gardner (1878) 49 Ia. 234. Mistake of surety in paying a supposed judgment against him. Alston *v.* Richardson (1879) 51 Tex. 1. Mistake by tenants in common in dividing profits of land. Irvine *v.* Hanlin (Pa. 1823) 10 S. & R. 219; Pegues *v.* Haden (1890) 76 Tex. 94. Mistake in making partition. Shute *v.* Fletcher (1896) 111 Mich. 84; Peck *v.* Arehart (1880) 95 Ill. 113.

Mistaken payments by public authorities. Payment for support of pauper. Peterborough *v.* Lancaster (1843) 14 N. H. 382; Inhabitants of Livermore *v.* Inhabitants of Peru (1867) 55 Me. 469. County paying fees to the sheriff. Painter *v.* Polk Co. (1890) 81 Ia. 242. See, also, Mayor *v.* Lancashire (1890) 60 L. J. Q. B. 323.

Mistake in marrying a person supposed to be divorced. Lopp *v.* Lopp (1880) 43 Mich. 287. Mistake in marriage settlement. Lant's App. (1880) 95 Pa. St. 279. Mistake by widower as to his estate as tenant by the curtesy. Stone *v.* Godfrey (1854) 5 De G. M. & G. 76. Mistake as to the existence of dormant partners not joined. Penny *v.* Martin (N. Y.

assent, and they take the view that the mutual mistake prevents the formation of the contract. This view, however, proceeds upon a confusion in thought caused principally by the application of the term "mutual mistake" to the cases of misunderstanding we have just noticed, and the consequent inclusion under the term of two classes of cases which should be sharply distinguished,—one, where the mistake prevents the formation of the contract, the other, where the mistake does not prevent the formation, but may or may not be the ground of relieving one party or the other from its burden.

The mistake in formation will prejudice one party or the other, and the party not prejudiced will generally be the one insisting on performance. If the party prejudiced prefers to carry out the contract, no question of mistake arises; he is willing to

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1820) 4 Johns. Ch. 566. Mistake in making an election. Pusey *v.* Desbouvrie (1734) 3 P. Wms. 315; Keener, Vol. 3, p. 2. See Ellsworth *v.* Ellsworth (1871) 33 Ia. 164; Evans's App. (1883) 51 Conn. 435; Macknet *v.* Macknet (1878) 29 N. J. Eq. 54; Watson *v.* Watson (1880) 128 Mass. 152. Mistake in satisfaction of a mortgage. Banta *v.* Vreeland (1862) 15 N. J. Eq. 103, Keener, Vol. 3, p. 368; Clow *v.* Derby Coal Co. (1881) 98 Pa. St. 432; French *v.* De Boa (1878) 38 Mich. 708; Willcox *v.* Foster (1882) 132 Mass. 320. Mistake in payment of a mortgage. Wheeler *v.* Hathaway (1885) 58 Mich. 77; Windbiel *v.* Carrol (N. Y. 1878) 16 Hun 101; Seeley *v.* Bacon (N. J. 1896) 34 Atl. 139, Keener, Vol. 3, p. 387; Wilson *v.* Barker (1862) 50 Me. 447; Peters *v.* Florence (1861) 38 Pa. St. 194; Guckian *v.* Riley (1883) 135 Mass. 71; Moorman *v.* Collier (1871) 32 Ia. 138. Mistake of mortgagee who has foreclosed, in paying prior encumbrances. Gerdine *v.* Menage (1889) 41 Minn. 417. Mistake by purchaser at sheriff's sale in paying bond not bound to pay. Espey *v.* Allison (Pa. 1840) 9 Watts 462. Mistake in taking possession of property bid in at sale under execution under a void judgment. Freichnecht *v.* Meyer (1885) 39 N. J. Eq. 551. Mistake as to the state of the record in surrendering an old mortgage and taking a new one, another mortgage intervening. Childs *v.* Stoddard (1881) 130 Mass. 110. Mistake in payment for redemption of land sold under execution. Neal *v.* Read (1874) 66 Tenn. 333. Mistake by *terre* tenant in paying money he supposed to be due in an execution under a judgment which was not a lien on the land. Boas *v.* Updegrove (1847) 5 Pa. St. 516. Mistake in settlement of claim for tort in ignorance of bar of Statute of Limitations. Clark *v.* Clark (1896) 55 N. J. Eq. 814. Mistake in acting on an erroneous decision of an inferior court on a point of law. Jacobs *v.* Morange (1871) 47 N. Y. 57. Mistake in relying on an act subsequently declared to be unconstitutional. Harney *v.* Charles (1869) 45 Mo. 157. Mistake in paying money by person charged as the father of a supposed unborn bastard child, it turning out that the mother was not in fact pregnant. Rheel *v.* Hicks (1862) 25 N. Y. 289. Mistake as affecting criminal liability. Cooper *v.* Comm. (1901) 110 Ky. 123. See, also, Hubbard *v.* Martin (Tenn. 1835) 8 Yerg. 498; Currie *v.* Goold (1817) 2 Madd. 163; Pritchard *v.* Woodruff (1880) 36 Ark. 196; People *v.* Foster (1890) 133 Ill. 496; Snelson *v.* State (1861) 16 Ind. 29; Wayne County *v.* Randall (1880) 43 Mich. 137; Gross *v.* Liber (1864) 47 Pa. St. 520; Real Est. Sav. Inst. *v.* Linder (1873) 74 Pa. St. 371; McMurray *v.* St. Louis Oil Co. (1863) 33 Mo. 377; Weed *v.* Weed (1883) 94 N. Y. 243; Powell *v.* Plant (Miss. 1898) 23 So. 399.

take his medicine, and the other party cannot complain. If the party who is not prejudiced performs first, and the other party fails to perform, the former is entitled to recover back his performance upon a theory generally referred to as failure of consideration, and his right to recover is the same whether the other party's failure to perform arises from the mistake or from any other cause. Therefore no question of mistake is properly involved in these cases, although it is generally so supposed by the courts and text writers.

If the mutual mistake is such as to make the performance of the contract impossible, the party prejudiced can be relieved from the burden under the doctrine of impossibility of performance. In many cases the contract may be performed, but the law nevertheless affords relief to the party prejudiced upon a principle analogous to the doctrine commonly referred to as unjust enrichment, the limits of which cannot be defined, so far as the subject is concerned, upon the few cases collected. It is probable that no accurate statement can be laid down on this point, as this seems to be one of the cases where a court of equity cannot hamper its jurisdiction by too close a definition. It is furthermore clear that the party prejudiced can have no greater advantage than relief from the burden of the contract, as the Chancellor cannot go further without making a new agreement between the parties, an exercise of power entirely inadmissible under the well-settled principles of equity. The relief in this case may be afforded by restraining the other party from suing at law for damages, or, in some cases, by rescission of the contract and a decree directing restoration of a part of the attempted performance. No mutual mistake in formation, therefore, will ever call for the reformation of a written document.

Where the mistake is made by one party only, which is commonly called a unilateral mistake, and is unknown to the other party, the former can have no relief because the latter is entitled to take the offer or acceptance at its face value. A court of equity, however, sometimes refuses to decree specific performance of such a contract when to do so would result in transferring property from one party to the other at a great undervaluation. When the unilateral mistake is known to the other party, the answer to the question whether the latter can take advantage of his superior knowledge and join in the formation of the contract without disclosure, depends on several considerations: (1) such

principles of business ethics as are recognized and incorporated into the law; (2) the particular nature of the contract in question, whether it is one demanding unusual good faith on the part of one party or the other; (3) the previous relation between the parties. If any of these considerations are involved, the case is probably one of fraud, to which branch of the law the discussion of these questions seems to more properly belong.

Where there is a mistake in reducing the contract to writing, the writing will be reformed to agree with the contract, and it is not necessary, although there is a common notion to that effect, for the mistake to be mutual.

Where there is a mistake in performance, it is not necessary, although it is frequently so supposed, for the mistake to be mutual in order that the law may afford relief.

Mistake in performance is of several kinds: (1) Performance of a contract to which the party performing has a good defence other than that arising out of a mutual mistake in formation. In this case the party performing can generally recover back the performance, usually by action for money paid under mistake. (2) Performance of a contract when the other party has by mistake made an insufficient performance of his part of the contract. The remedy of the party performing in this case is also equitable, and ordinarily is by action for money paid under mistake. (3) Mistake in performance to the prejudice of the other party. In this case the other party generally has a remedy at common law on the contract. (4) Mistake in performance to the prejudice of the party performing. The mistake in this case is generally that of overpayment of the amount due under a contract, and the party making the overpayment can recover back the excess in an action for money paid under mistake. Where the case is not that of the payment of money, the relief of the party performing is generally in a court of equity.

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